

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION APR 05 2002 JS
MICHAEL N. MILBY, CLERK OF COURT

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| Mark NEWBY, | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | Consolidated Lead No. H-01-3624 |
| | § | |
| ENRON CORP., et al., | § | |
| Defendants. | § | |
| <hr/> | | |
| AMERICAN NATIONAL | § | |
| INSURANCE COMPANY, et al., | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Civil Action No. G-02-0084 |
| | § | |
| ARTHUR ANDERSEN, L.L.P., et al., | § | |
| | § | |
| Defendants. | § | |

**ARTHUR ANDERSEN LLP'S OPPOSITION TO
AMERICAN NATIONAL INSURANCE COMPANY'S
MOTION FOR TEMPORARY INJUNCTION**

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DEFENDANT ARTHUR ANDERSEN LLP'S OPPOSITION TO
AMERICAN NATIONAL INSURANCE COMPANY'S
FOR TEMPORARY INJUNCTION

Defendant Arthur Andersen LLP ("Andersen") submits this memorandum in opposition to the emergency motion for a temporary injunction and request for hearing filed by American National Insurance Company, American National Investment Accounts, Inc., SM&R Investments, Inc., American National Property and Casualty Company, Standard Life and Accident Insurance Company, Farm Family Life Insurance Company, Farm Family Casualty Insurance Company, and National Western Life Insurance Company (collectively "American National" or "American National plaintiffs"). For the reasons set forth below, American National's motion should be denied.

INTRODUCTION

Without any legal or factual basis, American National seeks an order enjoining Andersen from (1) transferring any assets to foreign subsidiaries or affiliates, (2) releasing foreign subsidiaries or affiliates from obligations to Andersen, or (3) releasing any partners or employees from non-compete agreements, without the Court's express permission. See Plaintiffs' Emergency Motion for Temporary Injunction and Request for Hearing ("Plaintiffs' Motion") at 11. As a threshold matter, the relief sought by American National is barred as a matter of law by the Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Grupo Mexicano could not be more clear: where, as here, a plaintiff seeks only money damages, no injunction will issue. Moreover, notwithstanding Grupo Mexicano, the American National plaintiffs present no evidence on any issue and completely fail to meet their burdens for preliminary injunctive relief. Plaintiffs' motion must be denied in its entirety.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF AS A MATTER OF LAW

The Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), is directly on point and prohibits a federal court from granting pre-judgment injunctive relief where, as here, the underlying complaint seeks purely money damages. Therefore, American National's motion must be denied as a matter of law.

In Grupo Mexicano, the Supreme Court held that prior to entry of a money judgment in an action for damages, federal courts do not have the power to issue an injunction preventing the alleged debtor from transferring assets in which plaintiff has no equitable interest. Thus, when a plaintiff's action seeks no equitable relief but only money damages, no preliminary injunction can issue. Tracing the history of the federal courts' equitable powers, the Supreme Court confirmed "the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." Grupo Mexicano, 527 U.S. at 321. This rule is based on the principle that a general creditor (*i.e.*, one without a judgment) has "no cognizable interest . . . in the property of his debtor, and therefore [can] not interfere with the debtor's use of that property." *Id.* at 320 (noting that otherwise a "fruitless and oppressive interruption of the exercise of the debtor's rights" could result) (citation and internal quotation marks omitted).

It is beyond dispute that the complaint filed by American National seeks purely monetary damages for losses allegedly sustained in connection with their investments in Enron stock. See Original Petition, No.

01-CV-1218 (56th Judicial District, Galveston Co., Tex.) (filed Dec. 27, 2001) (“Petition”) at 22-23.¹

Thus, under Grupo Mexicano the preliminary injunctive relief plaintiffs seek is beyond the power of a federal court. Nevertheless, plaintiffs pointedly avoid mention of Grupo Mexicano, and instead disingenuously suggest that injunctive relief “though not common when only monetary damages are sought,” is certainly not unusual. See Plaintiffs’ Motion at 6. They rely for this argument on (a) a Supreme Court decision that has no applicability here (and was itself distinguished in Grupo Mexicano²) and (b) a small

¹American National’s Prayer for Relief in its entirety is as follows:

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendants be cited to appear and answer herein, and that upon trial of this cause judgment be rendered for Plaintiffs as follows:

- a. All actual, consequential, and special damages;
- b. Prejudgment interest as provided by law;
- c. Punitive damages as provided by statutory and common law;
- d. Attorneys fees and legal expenses (including expert fees);
- e. Post judgment interest; and
- f. Costs of court.

Plaintiffs pray for general relief and such other and further relief to which it may be entitled.

Petition at 22-23. Nowhere in this request for relief does a claim for equitable relief appear; the relief clearly is for money damages. The boilerplate language requesting “such other and further relief” is insufficient to set forth a cognizable claim for equitable relief. See Rosen v. Cascade Int’l, Inc., 21 F.3d 1520 (11th Cir. 1994) (rejecting preliminary injunction freezing assets in a case seeking only money damages, costs and attorney fees and “such other relief as the court deems just and proper”) (though pre-dating Grupo Mexicano, Rosen is consistent with that decision). In fact, plaintiffs apparently concede that their claim is only for money damages. See Plaintiffs’ Motion at 6 (implicitly acknowledging that their case is one in which “only monetary damages are sought”).

²See Grupo Mexicano, 527 U.S. at 326, distinguishing United States v. First Nat’l City Bank, 379 U.S. 378 (1965), on grounds that, inter alia, it involved a federal court’s power to issue an injunction under a specific tax statute rather than under the Judiciary Act of 1789.

group of lower court decisions that long predate Grupo Mexicano and arise in situations where a bankruptcy trustee is seeking to recover assets from a debtor seeking to hide them, where a party is seeking to enforce a contract, or where a party is seeking the recovery of specific property. See Plaintiffs' Motion at 6. Not one of those cases overcomes Grupo Mexicano or otherwise provides support for the injunction sought here.

Plaintiffs' motion epitomizes the concerns articulated by the Supreme Court in Grupo Mexicano. As the Court explained, allowing a pre-judgment freeze of assets in cases seeking purely monetary damages would encourage a race to the courthouse among various creditors in every case involving a defendant with financial difficulties. Grupo Mexicano, 527 U.S. at 331. Such competition would have unfortunate consequences and "might prove financially fatal to the struggling debtor." Id. Thus, as the Supreme Court described, the requirement of a prior judgment acts as a "fundamental protection" in debtor-creditor law. Id. at 330. The Court observed:

A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, *or interfere with the business affairs of the alleged debtor*, would manifestly be susceptible of the grossest abuse.

Id. (quoting F. Wait, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 73, at 110-11 (1884) (emphasis added)).

Andersen faces an extremely challenging situation, involving the needs of its creditors, clients, employees, partners, and others. Interference with Andersen's business affairs now at the request of a single group of ostensible creditors would be far from certain to benefit these six insurance companies, and

would certainly impair the interests of all concerned parties by impeding Andersen's ability to address the fluid situation before it in an efficient manner that maximizes the potential benefits to all concerned. Such a situation is precisely what the Supreme Court's holding in Grupo Mexicano sought to avoid.

II. PLAINTIFFS FAIL TO SATISFY THE TEST FOR PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction "is an extraordinary equitable remedy", Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999), and hence should not be granted lightly. To obtain such relief, plaintiffs must show (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury should the relief be denied; (3) that the threatened injury outweighs damage that granting the relief might cause the defendant; and (4) that granting the relief will not harm the public interest. See Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001); Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 442 (5th Cir. 2000). The movant bears the "heavy burden of persuading the district court that all four elements are satisfied." Hardin v. Houston Chronicle Publ'g Co., 572 F.2d 1106, 1107 (5th Cir. 1978) (affirming denial of preliminary injunction). As set forth below, plaintiffs fail to meet this test, and their motion for injunctive relief should be denied.

A. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits

The first prong of the test for preliminary relief requires plaintiffs to demonstrate a substantial likelihood of success on the merits of their underlying lawsuit. Rather than presenting evidence, American National relies entirely in conclusory fashion on a bunch of newspaper articles from various internet sites. See Plaintiffs' Motion at 8 and Exs. A-K. Even assuming multiple hearsay press reports from

TheMoscowTimes.com and *USA Today* were an acceptable evidentiary basis on which a court could measure likelihood of success on the merits, which they are not, the articles do not even say what plaintiffs claim they say. While plaintiffs refer to “revelations and admissions” by Andersen of wrongdoing, in fact, the eleven articles focus almost entirely on speculation regarding the potential merger or sale of various Andersen-related foreign entities (most of which are not parties to this action) and do little more than speculate as to the odds of Andersen’s survival. Plaintiffs have submitted no evidence of, nor even begun to argue, let alone show, a likelihood of success on the merits of their lawsuit. Thus, American National has failed to meet its burden on this point.

B. Plaintiffs Fail to Show a Substantial Threat of
Irreparable Injury Should the Relief Be Denied

American National has failed to show any threat, much less a substantial threat, of irreparable injury if injunctive relief is denied. As Judge Rosenthal noted in her decision in Newby v. Enron Corp., Nos. Civ.A. H-01-3624, Civ.A. H-01-4198, 2002 WL 200956 (S.D. Tex. Jan. 9, 2002), “A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed available assets.” Id. at *16. Preliminary injunctive relief generally requires evidence that the non-moving party is intentionally trying to hide or dissipate assets in order to prevent collection of a future judgment against it. See, e.g., Newby, 2002 WL 200956, at *15-16 (citing cases); Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Services, 144 F. Supp.2d 241, 246 (S.D.N.Y. 2001) (noting that defendant “appears to have a history of making judgments uncollectible”); Republic of Panama v. Air Panama Internacional, S.A., 745 F. Supp. 669, 674 (S.D. Fla. 1988) (finding that if parties were not enjoined from transferring assets, property likely would be beyond reach of plaintiff and the court, and

“irretrievably dissipated and lost”). Based on multiple hearsay, plaintiffs imply that Andersen might be disposing of assets for less than fair value (but offer no evidence of even one example), then argues that funds might later be unavailable to satisfy a judgment. But such argument based on unsupported allegations “does not provide a basis for concluding that [a] defendant is attempting to dissipate or conceal” assets in order to frustrate a future judgment. Newby, 2002 WL 200956, at *16.

Plaintiffs acknowledge that “[i]n the cases in which such a prejudgment asset-freezing injunction is granted, the courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of postjudgment collection, or were dissipating the assets.” See Plaintiffs’ Motion at 5 (quoting Newby, 2002 WL 200956, at *15). But they fail to deliver any evidence to suggest such activity in this case.

American National’s claims of irreparable harm are based on its conclusory and unsupported allegation that Andersen’s “conduct [purportedly reflected in the articles they attach] may seriously and detrimentally impact Andersen’s ability to satisfy any future award entered by the Court.” Plaintiffs’ Motion at 3. They proffer the unsupported supposition that Andersen “may be attempting to change its contractual relationship with these subsidiaries/affiliates as a means of positioning assets outside of this Court’s jurisdiction.” But there is no evidence that Andersen is trying to hide assets, dissipate them, or remove them from the Court’s jurisdiction and indeed no evidence that, if Andersen in fact has disposed any “asset”, it has not received fair value for it. Similarly, there is no evidence that Andersen partners have voted or plan to vote on a wholesale waiver of the non-compete agreements. Despite combing recent press reports to come up with these eleven articles to attach to their motion, nothing submitted by plaintiffs (and certainly

no admissible evidence) supports an allegation of improper conduct or motive regarding any potential transfers of Andersen's assets. Perhaps more importantly, there is no basis whatsoever to suggest, as American National for some unknown reason merely seems to assume, that any transfer of assets, were it to occur, would not be for fair value. Thus, there is no argument regarding dissipation of assets and no threat of harm to any interests of American National, much less a substantial threat of irreparable injury.

C. The Potential Damage to Andersen Far Outweighs
Any Threatened Injury to American National.

American National's motion, were it granted, would merely cause greater injury to Andersen and its creditors by injecting delay and uncertainty into any potential transaction, thus likely diminishing further the value of Andersen's assets. American National is asking the Court to review and approve Andersen business transactions. This is exactly the "interfer[ence] in the business affairs of the alleged debtor" that the Supreme Court in Grupo Mexicano prohibited federal courts from doing in this context. There is no basis for the Court to serve as a judicial board of directors deciding Andersen's affairs and making business judgments as Andersen tries to address the issues confronting it.

Thus, not only do plaintiffs request relief for which they have no legal or factual basis, but they posit a short-sighted, sensationalistic remedy that would cause significant harm to Andersen and severely impair Andersen's ability to address its current difficulties. In light of the unprecedented circumstances it faces, Andersen must attempt to conduct its day-to-day affairs in a manner that maximizes the interests of all parties affected by these events, including but not limited to creditors, employees, and its clients. The requested preliminary injunction would complicate and impair Andersen's good faith effort to address the situation, and could have collateral consequences that Andersen has not even had time to assess and

quantify. Andersen faces the challenge of restructuring its business and streamlining its costs in terms of personnel and other substantial expenses, in response to the well-documented loss of business stemming from recent client defections. Given the unprecedented and rapidly changing circumstances that Andersen faces, pre-judgment injunctive relief restricting the use of assets would undoubtedly cause Andersen irreparable harm far outweighing any potential harm that may accrue to plaintiffs from denial of the injunction. In any event, the requirement that Andersen seek and obtain Court approval before taking any action would be unduly burdensome and restrictive.

D. The Relief Sought Would Be
 Adverse to the Public Interest

Just as they have failed to satisfy the other requirements for preliminary relief, plaintiffs have likewise failed to show that granting the injunction they seek would not be adverse to the public interest. Women's Med. Ctr., 248 F.3d at 419 n.15. The sole contention plaintiffs make in this regard is that injunctive relief would assuage "the public outcry for reform that has followed the collapse of Enron and the ongoing revelations about Andersen's conduct." Plaintiffs' Motion at 10.³ But it is far from clear how an injunction inhibiting Andersen's efforts to economically and efficiently carry on its business, issued in a private civil action brought by a consortium of insurance companies seeking to recover their own alleged monetary losses, does anything at all to advance the "public outcry for reform" to which plaintiffs allude, or any other public interest. Rather, plaintiffs' request for an injunction is an attempt to advance their own self-interest

³The fact that an action was, as plaintiffs claim, filed by "Andersen's pensioners" has nothing to do with the public interests at stake in granting or denying the instant injunction. Plaintiffs' Motion at 10-11. In any event, plaintiffs in that action voluntarily withdrew their motion for preliminary relief of the kind sought by plaintiffs here.

by requiring Andersen to hold onto particular assets to satisfy their damages claim, even while the value of those very assets may well be declining – to the detriment of all other creditors.

Even more fundamentally, however, plaintiffs’ motion ignores the significant public interests that would be imperilled by issuance of the injunction; namely, protecting the interests of all parties adversely affected by the present circumstances, and attempting to ensure the stability and smooth functioning of the auditing and other professional services markets in which Andersen operates. As explained earlier, the injunction sought by plaintiffs would tie Andersen’s hands, rendering it unable to respond rapidly to the problems it faces and adding uncertainty to these already difficult circumstances. Rather than granting the injunction, therefore, the Court should permit Andersen to address its current circumstances in as fair and equitable a manner as possible to all interested parties, so that it can continue providing professional services to its clients, livelihoods to its thousands of employees and partners, and a basis for recovery to all its creditors.

III. NO TRO CAN ISSUE ABSENT A SUBSTANTIAL BOND

Federal Rule of Civil Procedure 65(c) requires that applicants for restraining orders or preliminary injunctions must post a bond to protect against damages incurred by a party later found to have been wrongfully enjoined or restrained:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c). See Monzillo v. Biller, 735 F.2d 1456, 1461 (D.C. Cir. 1984) (noting that purpose of security requirement “is to protect a party from damages suffered if it is later determined that the preliminary relief was wrongfully granted”). Posting of a bond is mandatory, and the failure to require posting or other security constitutes grounds for reversal of an injunction. Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 131 (5th Cir. 1990) (holding that party is not entitled to a preliminary injunction without posting security to indemnify defendant against potential financial loss due to wrongful injunction). The exact amount of the bond, however, is within the court’s discretion. See id. (remanding to district court to set amount of bond).

The potential harm to Andersen from a temporary injunction is precisely the threat against which Rule 65(c) is designed to protect. The harm to Andersen would be enormous. In the event that an injunction is granted (notwithstanding the myriad reasons why such an order should not issue), the Court should require a bond in an amount commensurate with that risk. Objective quantification of that risk is difficult, but Andersen’s provable damages could, in the environment Andersen faces, be hundreds of millions of dollars. Andersen notes that in an unlikely but not impossible scenario, Andersen’s claims against these plaintiffs for damages from an unjustified preliminary injunction could be asserted by persons standing in Andersen’s shoes. In light of the seriousness of this context, the Court must require that these plaintiffs post a bond of not less than two hundred fifty million dollars (\$250,000,000.00), itself but a small portion of the actual monetary harm that Andersen will incur if a preliminary injunction is entered.

CONCLUSION

For the foregoing reasons, the Court should deny American National's emergency motion for a temporary injunction and request for hearing.

Dated: Houston, Texas
April 5, 2002

Respectfully Submitted,

By: Rusty Hardin by Andrew Ramzel
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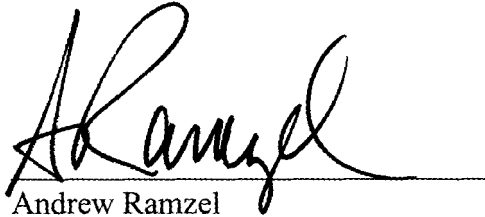
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2002, the foregoing pleading was served on

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